Supreme Court, U.S.
FILED
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No. ———

In The
Supreme Court of the United States

CLIENTS AND FORMER CLIENTS
OF BARON & BUDD, P.C.
and
OCCUPATIONAL MEDICAL RESOURCES, INC.,

Petitioners,

vs.

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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QUESTIONS PRESENTED

1. In 28 U.S.C. § 1407, the federal multidistrict litigation statute, does the "plain meaning" of the phrase "pretrial deposition" include a FED. R. CIV. P. 45 document subpoena?

2. Given the command of FED. R. CIV. P. 45 that a motion to quash a document subpoena shall be heard by "the court by which a subpoena was issued," can that court instead remit, refer or transfer the motion to quash to a different federal district court?

PARTIES TO THE PROCEEDING

Petitioners

Alexander, Raymond D.; Arroyo, Moises Romero; Arteaga, Serapio; Banks, Pearlean D.; Barnes, Erma J.; Bell, Helen J.; Blalock, Gerald J.; Boone, Johnnie Mobley; Boyd, Inell; Breshears, Jerrian Henry; Brown, L.C.; Brown, Della M.; Brown, Nina Faye Forte; Brown, Edward S.; Buckner, J.W.; Burleson, Billy L.; Caldwell, Floyd Edward; Caldwell, Wilbert; Casteel, Eddye; Cervantes, Arnulfo L.; Chamblee, Jacob, Jr.; Chatman, Pearlie M.; Chatman, Gloria Dean; Cherry, James C.; Collier, Patricia A.; Cook, James T.; Cook, Wilma J.; Culberson, Bobbie Earl; Culberson, Dianna; Dimsdale, Gladys Wilson; Dixon, Jaoler, Jr.; Dunn, Ruthie M.; Durrett, John Bunyon, Jr.; Edwards, George Lanta; Ellis, David Louis; Ellis, Billy C.; Ellis, Edna Marie; English, George Howard; Esmon, William Ray; Evans, Pearlie Mae; Ferrell, Elva W.; Fields, J.E.; Flournoy, Bobby Ray; Fonfara, Jimmy Donald; Ford, Clearthur, Jr.; Forte, Ulycess; Frazier, Ruby L.; Freeman, Gerald; Gamble, Vernita J.; Garrett, Gilbert C.; Gipson, Margaret A.; Givens, Linda Marie; Godfrey, Arxavia Earl; Golston, Caroline L.; Gooden, Nannie M.; Goodwin, James Clifford; Green, John M.; Hamilton, Erwin; Hampton, Melton; Hancock, George M.; Harris, Jimmie M.; Harris, Virgie Marie; Harris, Elnora; Hatridge, Minnie Pearl; Hawkins, Carrie M.; Hawkins, Nathaniel; Hawkins, Edgar; Hearon, George; Henderson, Minnie Frances; Hicks, Michael Dale; Hubbard, Crystle E.; Huey, Dorothy Lee; Humber, Billy R.; Humes, Charles Edwin; Hunter, Craig A.; Jefferson, Ammie; Jenkins, George Edward; Jett, Carolyn F.; Johnson, Otis; Johnson, Paul; Johnson, Dorothy O.; Johnson, James A., Sr.; Jones, Mary E.; Jones, Jewel O.; King, Arlon Ray; Knox, Roy; Korkmas, Patrick

PARTIES TO THE PROCEEDING – Continued

Ellis; Lacy, Albert; Lee, Roosevelt; Lisenby, Anita Kay; Magee, John Wayne; Mass, Robert L.; Mayfield, Earl, Jr.; McBryde, Kyle L.; McCoy, Jerry M., Jr.; McGraw, Willie; McIntyre, M.G.; Medina, Marcos, Jr.; Miller, James D.; Moore, Sam C.; Murray, Kenneth Carl; Nash, Paul Randolph; Neal, James Franklin; Nero, Minnie; Nero, R. Lee; Noiel, Leon; Oliver, Edward Hilton; Owens, Ophelia T.; Pinkney, Harvey; Powell, Willis; Riley, Albert D.; Riley, Jerlene; Roberson, Douglas; Sanders, Verna M.; Schutte, Donal Ray; Scott, Odell Pat; Scott, Leonard Ray; Scott, Don Ray; Sewell, James Richard; Shavers, Nellie Joyce; Sheets, Gerald M.; Simmons, Ronald, Sr.; Simmons, Clayton A., Sr.; Sims, Mollie; Smith, Scott Vann; Smith, Ella Rose; Smith, John W.; Smith, Dorothy Lou; Spencer, Charles D.; Stanfill, Charles Edward; Steele, Lester Joe; Stephens, Billie Frances; Stewart, Erna Murray; Stigers, Melba J.; Summers, Merdie M.; Tapia, Celio; Thomas, Linda Browning; Thompson, Mary; Thurman, Ella Mae; Tolbert, Ann E.; Tuck, Billy Earl; Tucker, Lester Jarvis; Veasey, Kenneth R.; Walker, Rosie Lee; Walker, Richard Larry; Ward, James; Ware, Rosie Lee; Watkins, Melvin Ray; West, R.C.; Westberry, James H.; Williams, Flora Jean; Williams, Oscar Willie; Williams, Dorothy N.; Williams, Henry J.; Williams, Charles W.; Williams, Heinz Arno; Williams, R.C., Jr.; Winget, Clell Hammer; Wood, Robert Wesley; and Wright, Charles Wayne; Occupational Medical Resources, Inc.

Nominal Respondent

The Honorable Vanessa D. Gilmore, United States District Judge

PARTIES TO THE PROCEEDING – Continued

Respondents

A.R. Wilfley & Sons, Inc.; Accurate Felt & Gasket Co., Inc.; Allied Glove Corporation (also known as Nationwide Glove Corporation); Amsted Industries, Inc.; Baldor Electric Company; Bondex International, Inc.; CertainTeed Corporation; Chemtura Corporation; Cooper Alloy Corporation; Crossfield Products Corporation; Eastern Safety Equipment Company, Inc. (also known as Aearo Company); Flexo Products, Inc.; Gardner Denver, Inc.; General Electric Company; Georgia-Pacific Corporation; The Gorman-Rupp Company; Gulf Coast Marine Supply Company; Pulsafeeder, Inc.; Viking Pump Company; Warren Rupp, Inc.; Illinois Tool Works Inc.; Ingersoll-Rand Company; Lawrence Pumps, Inc.; Magnetrol International, Inc.; Marine Specialty Company, Inc.; Mueller Steam Specialty; National Service Industries, Inc. f/d/b/a North Bros. Company; Owens-Illinois, Inc. d/b/a O-I; Pecora Corporation; Pneumo Abex, LLC; Rogers Corporation; Sager Glove Corporation; Aurora Pump Company; BIF; DeZurik, Inc.; Layne & Bowler Pump Group; Marsh Instruments; Standard Equipment Company, Inc.; Terex Corporation; Terex Cranes, Inc.; The American Crane Corporation; Turner Supply Company; Union Carbide Corporation; Amchem Products, Inc.; Warren Pumps, LLC; Yeoman's Chicago Corporation (also known as "Chicago Pump Company" or "Morris Machine Works/Morris Pumps"); Yuba Heat Transfer

CORPORATE DISCLOSURE

The Petitioners are individuals, and Occupational Medical Resources, Inc. There is no parent corporation or publicly held company owning 10% or more of the stock of Occupational Medical Resources, Inc.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding	ii
Rule 29.6 Corporate Disclosure Statement	v
Table of Contents	vi
Table of Authorities	vii
Opinions Below	1
Jurisdiction	1
Constitutional Provisions, Statutes, and Rules Involved	1
Statement of the Case	2
Reasons for Granting the Writ	3
Argument	4
Conclusion	10

TABLE OF AUTHORITIES

Page

CASES

Griffin v. Oceanic Contractors, Inc., 458 U.S. 564 (1982) 6

In re Clients and Former Clients of Baron & Budd, P.C., 478 F.3d 670 (5th Cir. 2007) 1

In re Clients and Former Clients of Baron & Budd, P.C., ___ F.3d ___, 2007 WL 898820 (5th Cir., Mar. 27, 2007) (Owen, J., dissenting) 1

In re Dresser Industries, Inc., 972 F.2d 540 (5th Cir. 1992) 2

In re Sealed Case, 141 F.3d 337 (D.C. Cir. 1998) 3, 4, 5

Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1997) 3, 8, 9

Pioneer Investment Services v. Brunswick Associates, 507 U.S. 380 (1993) 6

United States v. Ron Pair Enterprises, 489 U.S. 235 (1989) 3, 6

Will v. Calvert Fire Ins. Co., 437 U.S. 655 (1978) 1

STATUTES AND RULES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1407 .....*passim*

28 U.S.C. § 1651 2

Rule 45, Federal Rules of Civil Procedure .....*passim*

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

H.R. REP. 90-1130, 90th Cong., 2nd Sess., 1968 U.S. Code Cong. & Adm. News 1898, 1968 WL 4929, *2 (Feb. 28, 1968) 7

OPINIONS BELOW

The original panel opinion of the court of appeals is published at 478 F.3d 670, and is found at App. 1-4. The order of the court of appeals denying the petitioners' motion for rehearing and rehearing *en banc*, and the dissenting opinion from denial of the motion for panel rehearing is published at ___ F.3d ___, 2007 WL 898820, and is found at App. 5-15. The orders of the district court in Texas refusing to entertain the motions to quash and directing the petitioners to proceed instead in the multi-district litigation court in Pennsylvania are found at App. 16-17.

JURISDICTION

The court of appeals' order denying the motions for rehearing were issued on March 27, 2007. This Court has jurisdiction over this petition under 28 U.S.C. § 1254(1). In *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655 (1978), this Court exercised certiorari jurisdiction over a mandamus order of a court of appeals.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

Appended as App. 18-22 are 28 U.S.C. § 1407 and Rule 45, Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

Various defendants which are parties to the federal asbestos Multidistrict Litigation proceeding (MDL 875) in Philadelphia issued two Rule 45 document subpoenas from the federal district court in Houston, Texas, and served them on Petitioner Occupational Medical Resources, Inc. ("OMR"). Within the time permitted by Rule 45, the Individual Petitioners, who are persons whose medical and other private records are the objects of the subpoenas, filed motions to intervene and to quash the subpoenas. OMR filed motions to quash as well. The Houston federal court opened two miscellaneous proceedings, one for each subpoena. Neither the Individual Petitioners nor OMR are parties to any case in MDL 875.

On September 20, 2006, the Houston district court entered identical orders in both miscellaneous proceedings that ordered, *inter alia*, that: "All future pleadings in this case be filed in MDL 875." Petitions for writs of mandamus were then filed by the Individual Petitioners and OMR in the Fifth Circuit Court of Appeals, which court had jurisdiction over those petitions pursuant to 28 U.S.C. § 1651.[1] On February 8, 2007, a panel of the Fifth Circuit issued an opinion which denied the writs. Timely motions for rehearing by the panel and by the court *en banc* were filed on February 21, 2007. On March 27, 2007, the Court of Appeals issued an order which denied the motions for rehearing, with one member of the panel dissenting from denial of the motion for panel rehearing.

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[1] *See, e.g., In re Dresser Industries, Inc.*, 972 F.2d 540, 543 (5th Cir. 1992) ("Mandamus is appropriate 'when the trial court has exceeded its jurisdiction *or has declined to exercise it.*") (emphasis added).

REASONS FOR GRANTING THE WRIT

First, the 2-1 opinion of the Fifth Circuit, contrary to the plain language of Rule 45, allows a motion to quash a Rule 45 subpoena filed in the issuing court to be transferred to another federal court, and thus conflicts with the decision of the United States Court of Appeals for the District of Columbia Circuit in *In re Sealed Case*, 141 F.3d 337 (D.C. Cir. 1998).

Second, the *ratio decendi* of the panel opinion was that 28 U.S.C. § 1407(b) trumps the restrictions of Rule 45 because multidistrict litigation judges can preside over a "pretrial deposition" in any district. Yet, no "pretrial deposition" was at issue here; only subpoenas for document production. Therefore, the Fifth Circuit opinion conflicts with this Court's "plain meaning rule" cases such as *United States v. Ron Pair Enterprises*, 489 U.S. 235 (1989) and with *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1997), where this Court applied the "plain meaning rule" to Section 1407.

Since these conflicts are interrelated, they are discussed in that same manner. That is, because the Fifth Circuit ignored this Court's statutory interpretation jurisprudence, and in conflict with those authorities equated a "document subpoena" to a "pretrial deposition," the Fifth Circuit reached an erroneous conclusion that conflicts with the District of Columbia Circuit's opinion and with the plain language of Rule 45.

ARGUMENT

The panel opinion allows a document subpoena proceeding to be "relocated" from the issuing district court in Houston, Texas to the MDL court in Philadelphia, Pennsylvania in violation of Rule 45(c)(3)(A), FED. R. CIV. P., as authoritatively interpreted by the United States Court of Appeals for the District of Columbia Circuit in *In re Sealed Case*, 141 F.3d 337 (D.C. Cir. 1998).

In 1991, this Court and Congress wrought significant changes to Rule 45. According to the Advisory Committee, one purpose of the 1991 amendments was "to clarify *and enlarge* the protections afforded persons who are required to assist the court by giving information or evidence." Now, where a third-party seeks protection from the issuing court, the text of the Rule gives *only* that court the power and the duty to enforce or protect. Rule 45(c)(3)(A), FED. R. CIV. P. ("the court by which a subpoena was issued shall quash or modify the subpoena.")

Accordingly, in *In re Sealed Case*, 141 F.3d 337 (D.C. Cir. 1998), the District of Columbia Circuit held that the plain meaning of Rule 45 does not permit a court to transfer a subpoena proceeding:

> The place to start . . . is the text of Rule 45. That text offers no authorization to transfer a motion to quash and seems at least implicitly to forbid it. The rule permits, and in some circumstances requires, "the issuing court" to quash or modify a subpoena. *See* Fed.R.Civ.P. 45(c)(3)(A). It allows enforcement of a subpoena following objections only "pursuant to an order of the court by which the subpoena was issued." Fed.R.Civ.P. 45(c)(2)(B). It provides that failure to obey a subpoena may be deemed contempt "of the court from which the

> subpoena issued." Fed.R.Civ.P. 45(e). All of this language suggests that only the issuing court has the power to act on its subpoenas. Subpoenas are process of the issuing court, and nothing in the Rules even hints that any other court may be given the power to quash or enforce them.

In re Sealed Case, 141 F.3d at 341 (case citations omitted).

The Fifth Circuit held, however, that 28 U.S.C. § 1407(b) trumped the geographic protections given to subpoenaed third-parties, and allowed the miscellaneous subpoena proceedings to be litigated not in the issuing court in the Southern District of Texas, but in MDL 875 a thousand miles away in the Eastern District of Pennsylvania. The Fifth Circuit opinion crashed through many legal roadblocks on its way from Texas to Pennsylvania, not the least of which is the plain language of both Rule 45 and Section 1407(b). As the District of Columbia Circuit held, Rule 45(c)(3)(A) could not be any clearer; only an issuing court can address a motion to quash filed there by a third-party. According to the Fifth Circuit, however, a passage from Section 1407(b) instead allows a multidistrict litigation court to address an issuing court's document subpoena: "The judge . . . to whom such actions are assigned . . . may exercise the powers of a district judge in any district *for the purpose of conducting pretrial depositions* in such coordinated or consolidated pretrial proceedings." (emphasis added). Therefore, the Fifth Circuit's opinion ignored the "plain meaning rule" and failed also to explain why the plain meaning of Section 1407(b) could legitimately be ignored.

This Court's plain meaning rule jurisprudence is well-developed. In determining a statute's plain meaning, courts must assume that "Congress intends the words in its enactments to carry their ordinary, contemporary,

common meaning." *Pioneer Investment Services v. Brunswick Associates*, 507 U.S. 380, 388 (1993). As this Court has also stated: "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982) (internal quotation marks omitted). Significantly, if the language of the statute is clear, "the inquiry should end." *United States v. Ron Pair Enterprises*, 489 U.S. 235, 241 (1989). It has never been suggested, even by the authorities cited by the Fifth Circuit majority, that "pretrial deposition" and "document subpoena" are synonymous. Such a suggestion would be silly, and therefore unless the plain meaning rule were for some reason not applicable, "the inquiry should end." *Ron Pair,* 489 U.S. at 241. Since the plain meaning of Section 1407(b) does *not* grant an MDL judge the power to adjudicate remote Rule 45 document subpoenas served on third-parties, Rule 45(c)(3)(A), FED. R. CIV. P. controls, and Rule 45 permits *only* the issuing court to act on motions to quash such subpoenas.

No exception to the plain meaning rule applies to this portion of Section 1407(b). This is not, in other words, one of "the rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *Ron Pair*, 489 U.S. at 242 (internal quotes, brackets and citations omitted). Nothing in the legislative history of Section 1407(b) indicates Congress *really* intended to say "The judge . . . to whom such actions are assigned . . . may exercise the powers of a district judge in any district for the purpose of conducting *all pretrial discovery proceedings* in such coordinated or consolidated pretrial proceedings." Indeed, Congress used

the term "pretrial proceedings" rather liberally throughout Section 1407, making it all the more apparent that Congress was drafting with care when choosing for this one purpose the term "pretrial depositions." The House Report on the then-new Section 1407 confirms that Congress intended the result sought by the Petitioners, and certainly does not suggest that applying the plain meaning of the statute will create a result that is at odds with actual intent. As Congress stated: "The proposed new section 1407 establishes a Judicial Panel on Multidistrict Litigation which is empowered to . . . act as and designate other judges or ***deposition*** judges in any district." H.R. REP. 90-1130, 90th Cong., 2nd Sess., 1968 U.S. Code Cong. & Adm. News 1898, 1968 WL 4929, *2 (Feb. 28, 1968).

Obviously, Congress was also familiar with the difference between a deposition and a document demand – Congress and this Court made separate rules for these different discovery mechanisms in the Federal Rules of Civil Procedure, and these different discovery mechanisms are addressed in different parts of Rule 45 as well. It is also clear that the drafters of the 1991 amendments to Rule 45 intended to provide non-parties with new geographic protections when burdened with document subpoenas. As the Advisory Committee Notes to the 1991 amendments stated, one purpose of the amendments to Rule 45 was "to clarify *and enlarge* the protections afforded persons who are required to assist the court by giving information or evidence."

In sum, there is absolutely no basis to apply an exception to the plain meaning rule to Section 1407(b). The legislative history of Section 1407 is consistent with and supports its plain meaning; certainly, there is no evidence of a legislative intent that is *contrary* to the plain

meaning of "pretrial depositions." In addition, the clear intent of the 1991 amendments to Rule 45 was to give new and greater geographic protections to non-parties served with document subpoenas. Taking all of this together, it is simply impossible to say that the plain meaning of Section 1407(b) is contrary to the will of Congress.

This Court has rejected pleas to ignore the plain meaning of Section 1407. In *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1997), the Court made it clear that Section 1407(b) must be interpreted like any other statute, and it cannot be employed, even for supposedly salutary administrative purposes, in a manner that is contrary to its plain meaning. In *Lexecon*, the question was whether an MDL court could, by virtue of Section 1407, effect a "self-transfer" under Section 1404(a). At the time of the *Lexecon* decision, lower court jurisprudence permitted it, as did the Rules of the Judicial Panel itself. *Lexecon*, 523 U.S. at 32-33. This Court closely analyzed the text of Section 1407, which contained some support for the practice, but ultimately found that the "plain command" found in Section 1407(a) that "Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated" precluded self-transfers. *Id.* at 35-37.

The primary teachings of *Lexecon* are, of course, that Section 1407 is not interpreted any differently that statutes generally, and there is nothing about Section 1407, its application or its legislative history that overrides its plain meaning. While that is certainly sufficient to grant the writ and require the Fifth Circuit to apply the statute as written, parallels between the issue in *Lexecon* and that

presented in the present case are significant. In *Lexecon*, the question was whether Section 1407 could be interpreted, contrary to its plain language (that the case must be remanded following pretrial proceedings), to permit the MDL court to take charge of a proceeding (the trial on the merits) which because of other federal rules or statutes (federal court venue and transfer statutes) could only take place in a different forum of the petitioner's choice (where petitioner filed the case). The plain meaning of course prevailed, maintaining the petitioner's forum choice over the attempt to use Section 1407 to lodge jurisdiction in the MDL court. Likewise, here, the issue is the same; can Section 1407 be interpreted, contrary to its plain language (MDL judges have extra-district jurisdiction only over "pretrial depositions"), to permit an MDL court to take charge of a proceeding (motion to quash a Rule 45 document subpoena) which because of other federal rules or statutes (Rule 45(c)(3)(A), FED. R. CIV. P.) can only take place in a different forum of the petitioner's choice (where the petitioner filed the motion to quash). Again, the plain meanings of both Section 1407 and Rule 45 preclude the MDL court from overriding the petitioners' forum choice.

Lexecon's final lesson is that in adhering to the statute's "plain command," the Court was not swayed by arguments that self-transfers would be good policy or wise judicial administration: It "may or may not be correct that permitting transferee courts to make self-assignments would be more desirable than preserving a plaintiff's choice of venue . . . but the proper venue for resolving that issue remains the floor of Congress." *Lexecon*, 523 U.S. at 40. If Congress wants to exempt third-parties subpoenaed for document production in Multidistrict Litigation cases from the geographic protections of Rule 45, it can easily

rewrite Section 1407 to do so. At present, however, document subpoenas served on third-parties are governed by Rule 45(c)(3)(A), not by Section 1407(b).

CONCLUSION

The court of appeals clearly erred by ignoring the plain meaning of Rule 45 and of Section 1407. As a result, it reached a result that conflicts with a decision of the District of Columbia Circuit. This Court should, therefore, grant this application for writ of certiorari, and reverse the Fifth Circuit and direct it to, as the minority opinion would, grant the petitions for writs of mandamus.

Respectfully submitted,

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478 F.3d 670

United States Court of Appeals, Fifth Circuit.
In Re: CLIENTS AND FORMER CLIENTS OF **BARON & BUDD**, P.C. and Occupational Medical Resources, Inc., Petitioners.
Nos. 06-20835, 06-20836
Summary Calendar.

Feb. 8, 2007

Alan B. Rich, Baron & Budd, Dallas, TX, for Petitioner Clients.

Austin H. England, Veon & England, Irving, TX, for Petitioner Occ. Med. Res. Inc.

Walter G. Watkins, Jr., Fred H. Krutz, III, Marcy B. Croft, Forman, Perry, Watkins, Krutz & Tardy, Jackson, MS, Roger Henry Nebel, Forman, Perry, Watkins, Krutz & Tardy, Houston, TX, for Respondent.

Petitions for Writs of Mandamus to the United States District Court for the Southern District of Texas.

Before SMITH, WIENER, and OWEN, Circuit Judges.

PER CURIAM:

Petitioners are Occupational Medical Resources, Inc. ("OMR"), and individuals whose records are in OMR's possession. Petitioners seek a writ of mandamus ordering the district court to rule on motions to intervene and motions to quash regarding a subpoena. We deny the petition.

I.

The respondents are defendants in matters pending in the Asbestos Multi-District Litigation Court No. 875 ("MDL 875") in the United States District Court for the Eastern District of Pennsylvania. Pursuant to Federal Rule of Civil Procedure 45, respondents issued a subpoena through the United States District Court for the Southern District of Texas for the production of documents and material from OMR. The individuals moved to intervene, and to quash the subpoena, in the Texas court. OMR also moved to quash in that court; its motion remains unresolved. The Texas court entered the order that is now being challenged; it (1) denied the individuals' motions and (2) directed that "[a]ll future pleadings in this case be filed in MDL 875." Petitioners complain only about the second part of the order.

II.

Petitioners rely largely on the text of rule 45(c)(3)(A), which states that "the court by which a subpoena was issued shall quash or modify the subpoena. . . ." To the same effect, rule 45(e) states that "[f]ailure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued." Petitioners claim that by the text of these two provisions, only the Texas court may enforce the subpoena and protect parties from its terms.

Respondents answer that MDL proceedings are to be treated differently. They rely primarily on 28 U.S.C. § 1407(b), dealing with MDL proceedings, which provides that "[t]he judge to whom such [MDL] actions are assigned . . . may exercise the powers of a district judge in any

district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings." The question of law that we must decide to evaluate the mandamus petition is whether the authority conferred on the MDL court by § 1407(b) extends beyond depositions so as to embrace the instant subpoenas.

III.

Based on the overwhelming weight of authority, we answer in the affirmative. A persuasive analysis is set forth in a leading treatise:

> A motion to quash or modify a subpoena is to be granted by "the court by which a subpoena was issued." If a subpoena is issued by a district court other than the one in which the case is pending . . . , the proper court in which to file a motion to quash or modify the subpoena is the issuing court, not the court in which the action is pending. . . .
>
> . . .
>
> Certain federal statutes create an exception to the rule that only the issuing court may quash, modify, or enforce a subpoena. For example, the multidistrict litigation (MDL) statute . . . authorizes a judge assigned an MDL action to "exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings." [citing § 1407(b)]. This statute therefore authorizes the transferee district court to exercise the authority of a district judge in any district: The transferee court may hear and decide motions to compel or motions to quash or modify subpoenas directed to nonparties in any

> district. Though the statutory language refers to "pretrial depositions," the statute wisely has been interpreted to embrace document production subpoenas as well.

9 James W. Moore et al., Moore's Federal Practice § 45.50, at 45-75 through 45-77 (Matthew Bender 3d ed.2006) (footnotes omitted). "In multidistrict litigation, the court in charge of the consolidated proceedings has the power to rule on a motion to quash subpoenas." 9A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 2459, 2006 Supp., at 19 (West 1995). "The court in charge of consolidated proceedings has power to rule on a motion to quash subpoenas." *Id.* at 19 n. 14.2.

This conclusion is supported by the convincing analyses of myriad district courts. *E.g., In re Auto. Refinishing Paint Antitrust Litig.*, 229 F.R.D. 482, 485 n. 5 (E.D.Pa.2005); *United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., Inc.*, 238 F.Supp.2d 270, 274-75 (D.D.C.2002); *In re Subpoenas Served on Wilmer, Cutler & Pickering & Goodwin Proctor LLP*, 255 F.Supp.2d 1, 1-3 (D.D.C.2003); *HCA, Inc. v. United States ex rel. Pogue*, 2002 WL 31953748, at *3-*4 (M.D.Tenn.2002); *In re Subpoena Issued to Boies, Schiller & Flexner LLP*, 2003 WL 1831426, at *1 (S.D.N.Y.2003). *VISX, Inc. v. Nidek Co.*, 208 F.R.D. 615, 616 (C.D.Cal.2002).

The petition for writ of mandamus is DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE: SUBPOENA ISSUED TO OCCUPATIONAL MEDIAL RESOURCES	§ § §	**CIVIL ACTION NO. H-06-MC-307**

ORDER

IT IS HEREBY ORDERED that Intervenors/Objectors' Motion to Intervene **(Instrument No. 3-1)** is **DENIED** and Intervenors/Objectors' Motion to Quash Subpoena **(Instrument No. 3-2)** is **DENIED as moot**. All future pleadings in this case should be filed in MDL 875.

The Clerk shall enter this Order and provide a copy to all parties.

SIGNED on this the 20th day of September, 2006, at Houston, Texas.

/s/ Vanessa D. Gilmore
VANESSA D. GILMORE
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE: SUBPOENA ISSUED TO OCCUPATIONAL MEDIAL RESOURCES	§ § §	**CIVIL ACTION NO. H-06-MC-306**

ORDER

IT IS HEREBY ORDERED that Intervenors/Objectors' Motion to Intervene **(Instrument No. 3-1)** is **DENIED** and Intervenors/Objectors' Motion to Quash Subpoena **(Instrument No. 3-2)** is **DENIED as moot**. All future pleadings in this case should be filed in MDL 875.

The Clerk shall enter this Order and provide a copy to all parties.

SIGNED on this the 20th day of September, 2006, at Houston, Texas.

/s/ Vanessa D. Gilmore
VANESSA D. GILMORE
UNITED STATES
DISTRICT JUDGE

2007 WL 898820

United States Court of Appeals, Fifth Circuit.
In Re: CLIENTS AND FORMER CLIENTS OF **BARON & BUDD**, P.C. and Occupational Medical Resources, Inc., Petitioners.
Nos. 06-20835, 06-20836.

March 27, 2007.

Alan B. Rich, Baron & Budd, Dallas, TX, for Clients & Former Clients of Baron & Budd.

Austin H. England, Veon & England, Irving, TX, for Occ. Med. Resources, Inc.

Walter G. Watkins, Jr., Fred H. Krutz, III, Marcy B. Croft, Forman, Perry, Watkins, Krutz & Tardy, Jackson, MS, Roger Henry Nebel, Forman, Perry, Watkins, Krutz & Tardy, Houston, TX, for Respondent.

Petitions for Writs of Mandamus to the United States District Court for the Southern District of Texas; Vanessa D. Gilmore, Judge.

On Petition for Rehearing and Rehearing En Banc

Opinion Feb. 8, 2007, 5th Cir.,
478 F.3d 670 (5th Cir.2007)

Before SMITH, WIENER, and OWEN, Circuit Judges.

PER CURIAM:

The petition for rehearing is DENIED, and no member of this panel or judge in regular active service having requested that the court be polled on rehearing en banc, the petition for rehearing en banc is DENIED.

OWEN, Circuit Judge, dissenting from the denial of panel rehearing:

> After considering the relators' petitions for rehearing and more carefully examining the provisions of 28 U.S.C. § 1407, I am compelled to conclude that § 1407 does not authorize the court presiding over multidistrict litigation in the Eastern District of Pennsylvania to quash the subpoena issued by a district court in the Southern District of Texas. Accordingly, I conclude that the District Court for the Southern District of Texas abused its discretion in dismissing the motion to quash the subpoena as moot, in dismissing the motion to intervene as moot, and in entering a blanket order directing that all future pleadings should be filed in multidistrict litigation pending in the Eastern District of Pennsylvania. While § 1407 confers broad powers upon a transferee court in multidistrict litigation to conduct pretrial proceedings, it does not confer the power to issue, enforce, or quash a subpoena for the production of documents that is unrelated to a deposition and is directed to a party who is not subject to the subpoena power of the multidistrict litigation court. While I agree that it might be "wise" to treat document subpoenas in the same manner as depositions, Congress has not done so, and we are constrained by the limits of § 1407.

I

Defendants in multidistrict litigation pending in the Eastern District of Pennsylvania served Occupational Medical Resources, Inc. (OMR) with a subpoena issued from the Southern District of Texas seeking the production

of documents. OMR is not a party to the multidistrict litigation and has not been noticed for a deposition, nor has an OMR witness been subpoenaed for deposition. OMR provides x-ray services, and the subpoena sought OMR's records regarding numerous individuals who are not parties to the multidistrict litigation. OMR filed a motion to quash this subpoena with the district court that issued it, and many of the individuals whose records are at issue sought leave to intervene and to quash the subpoena, arguing that their personal information was not properly the subject of discovery.

The district court denied all relief. It entered an order directing: "All future pleadings in this case should be filed in MDL 875 [the multidistrict litigation in the Eastern District of Pennsylvania]." The court denied OMR's and its clients' motions to quash as moot and similarly denied the motion to intervene as moot. OMR and the other relators have asked this court to issue a writ of mandamus directing the district court to withdraw these orders and address the merits of the motions.

II

Section 1407 provides that when civil actions are transferred to a district by the judicial panel on multidistrict litigation, the purpose of the transfer is "for coordinated or consolidated pretrial proceedings" and to "promote the just and efficient conduct of such actions."[1] Undoubtedly, Congress intended that a judge who presides over multidistrict litigation is to have broad power to conduct pretrial proceedings:

[1] 28 U.S.C. § 1407(a) (2000).

(a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: Provided, however, That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

(b) Such coordinated or consolidated pretrial proceedings shall be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation. For this purpose, upon request of the panel, a circuit judge or a district judge may be designated and assigned temporarily for service in the transferee district by the Chief Justice of the United States or the chief judge of the circuit, as may be required, in accordance with the provisions of chapter 13 of this title. With the consent of the transferee district court, such actions may be assigned by the panel to a judge or judges of such district. The judge or judges to whom such actions are assigned, the members of the judicial panel on multidistrict litigation, and other circuit and district judges designated when needed by the panel may exercise the powers of a district

> judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings.[2]

The term "pretrial proceedings" in § 1407(a) encompasses a broad range of pretrial matters, including most discovery issues,[3] and extends to dispositive motions.[4] However, Congress apparently did not think that it had granted a transferee district the power to issue subpoenas to non-parties who were not subject to that district's jurisdiction, or else it would not have included the following sentence in § 1407(b):

> The judge or judges to whom such actions are assigned, the members of the judicial panel on multidistrict litigation, and other circuit and district judges designated when needed by the panel may exercise the powers of a district judge in any district for the purpose of conducting pretrial

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[2] *Id. See generaly In re The Upjohn Co. Antibiotic Cleocin Prods. Liab. Litig.*, 664 F.2d 114 (6th Cir.1981) (discussing power of judge presiding over multidistrict litigation).

[3] *See, e.g., In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 460 F.3d 1217, 1230 (9th Cir.2006) (observing that § 1407 "was meant to 'assure uniform and expeditious treatment in the pretrial procedures in multidistrict litigation'" and that "[w]ithout it, 'conflicting pretrial discovery demands for documents and witnesses' might 'disrupt the functions of the Federal courts' as they nearly had in the electrical equipment company cases.") (quoting H.R.Rep. No. 1130, 90th Cong., 2d Sess. 1 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1898, 1899).

[4] *Id.* at 1231-32 holding that the transferee court had authority to dismiss claims for failure to comply with case management orders); *In re Temporomandibular Joint (TMJ) Implants Products Liab. Litig.*, 97 F.3d 1050, 1055 (8th Cir.1996); *In re Donald J. Trump Casino Sec. Litig.-Taj Mahal Litig.*, 7 F.3d 357, 367-68 (3d Cir.1993); *Humphreys v. Tann*, 487 F.2d 666, 668 (6th Cir.1973).

> depositions in such coordinated or consolidated pretrial proceedings.[5]

This sentence seems to recognize that consolidating actions from multiple districts into one district for pretrial purposes does not extend the transferee court's jurisdiction over non-parties. A transferee court cannot subpoena non-parties who are not subject to the transferee court's jurisdiction. If it could, the foregoing provision would be entirely unnecessary.

The provision in § 1407(b) was apparently deemed essential to permit a transferee judge to act within another district with regard to presiding over depositions, and even then, to act not as a judge in the multidistrict litigation transferee district, but as a judge in the district in which the witness was subject to jurisdiction. For the purpose of conducting pretrial depositions in a district other than the transferee district, the judges enumerated in § 1407(b) may act as district judges sitting in any district, as distinguished from transferee judges acting in the transferee district. This structure seems purposeful and deliberate. It indicates the intent to correspond with and complement, rather than disembowel, the Federal Rules of Civil Procedure regarding subpoenas of non-parties. Accordingly, a multidistrict litigation transferee judge may preside over the taking of depositions in a district other than the transferee district. But in this limited circumstance, the transferee judge will be acting

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[5] 28 U.S.C. § 1407(b) (2000).

as a member of the non-transferee district rather than a member of the transferee district.[6]

This court has so construed § 1407(b) on at least two occasions.[7] In *In re Corrugated Container Antitrust Litigation,* multidistrict litigation was pending in Texas, and a district court in the Southern District of New York issued a subpoena requiring a witness to appear for a deposition. After the witness refused to answer certain questions, the presiding judge of the multidistrict litigation held the witness in contempt. This court concluded that § 1407 "enabled Judge Singleton to preside over Fleischaker's deposition in New York," and that "[i]n ordering Fleischaker to respond and in holding him in contempt, Judge Singleton was exercising the powers of a district judge of the District Court for the Southern District of New York."[8] This court continued, "As the legislative history of section 1407 indicates, his actions were limited by the ordinary

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[6] *See In re Corrugated Container Antitrust Litig.,* 662 F.2d 875, 880-81 (D.C.Cir.1981); *In re Corrugated Container Antitrust Litig.,* 647 F.2d 460, 461 (5th Cir. Unit A May 1981) (holding that when the transferee judge from the Southern District of Texas entered an order of contempt for a non-party witness's failure to answer deposition questions, the transferee judge "was acting as a district judge sitting in the District of Columbia," where the witness was located and was deposed); *In re Corrugated Container Anti-Trust Litig.,* 620 F.2d 1086, 1090-91 (5th Cir.1980) (holding that "the only court that had the power to compel . . . a non-party deponent[ ] to answer questions at a deposition conducted in the Southern District of New York was the district court sitting in that district" and that transferee judge from the Southern District of Texas was acting as a district judge for the Southern District of New York in presiding over the deposition).

[7] *In re Corrugated Container Antitrust Litig.,* 647 F.2d at 461; *In re Corrugated Container Anti-Trust Litig.,* 620 F.2d at 1091.

[8] 620 F.2d at 1091.

operation of the Rules of Civil Procedure."[9] In a similar dispute the following year, this court held, "[W]hen Judge Singleton entered his order of contempt, he was acting as a district judge sitting in the District of Columbia."[10] While rulings of a multidistrict litigation court are reviewed by the circuit for the district to which the multidistrict litigation was transferred, rulings by a multidistrict judge sitting as a judge of another district when presiding over depositions are reviewed by the circuit for the district in which the subpoena issued.[11]

The District of Columbia Circuit has also explained the interplay between what it characterized as different grants of authority within § 1407:

> Section 1407, which established special procedures allowing the transfer of pretrial proceedings in multidistrict litigation, contains two kinds of authority. One is for the transfer of pending causes of action from one district to another district for pretrial purposes only. 28 U.S.C. § 1407(a). The judge who is assigned to preside over the transferred action exercises his authority as a member of the district court to which the action has been transferred. Congress believed that the possibility for conflict and duplication in discovery and other pretrial procedures in related cases (could) be avoided or minimized by . . . centralized management. To accomplish this objection the (statute) provides for the transfer of

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[9] *Id.*

[10] *In re Corrugated Container Antitrust Litig.*, 647 F.2d at 461.

[11] *In re Corrugated Container Antitrust Litig.*, 662 F.2d at 880-81; *In re Corrugated Container Antitrust Litig.*, 647 F.2d at 461; *In re Corrugated Container Anti-Trust Litig.*, 620 F.2d at 1090.

> venue of an action for the limited purpose of conducting coordinated pretrial proceedings.
>
> * * *

The second grant of authority in section 1407 is of a different sort. It grants to the judges who have been assigned multidistrict litigation the powers of a district judge in other districts in order to supervise depositions being conducted in those other districts. 28 U.S.C. § 1407(b). . . . The deposition proceedings remain anchored in the courts of the districts where they are being conducted, but because of the obvious policy reasons for allowing a single judge to preside over the disparate activity in a multidistrict case, . . . the multidistrict judge is granted the same powers as a judge of those courts where the depositions are being taken.[12]

That circuit court noted, "It seems eminently reasonable that the rules governing deposed non-party witnesses should be determined by the jurisdiction in which they may be deposed rather than by a distant place in which the multidistrict litigation is pending."[13] That court also observed that the district in which the multidistrict litigation was pending, the Southern District of Texas, did not have jurisdiction over the non-party witness, who resided in the vicinity of the District of Columbia, and that "a subpoena could only have issued in or near the District of Columbia and only a judge in the district where the

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[12] *In re Corrugated Container Antitrust Litig.*, 662 F.2d at 880-81 (citations omitted, alterations in original).

[13] *Id.* at 881 n. 11.

deposition is taken, not where the litigation is pending, could hold appellant in contempt."[14]

Notably, the provision in § 1407(b) authorizing a multidistrict litigation judge to exercise power as another district judge in any district is limited to depositions. This provision does not give the same authority with regard to document subpoenas that are unrelated to any deposition. We cannot assume such an omission is an oversight or an error on the part of Congress. Congress is presumed to know the difference between depositions and subpoenas seeking the production of documents, and that the Rules of Civil Procedure separately delineate the attributes of each.[15]

The upshot is that the judge presiding over the multidistrict litigation in Pennsylvania or another judge designated under § 1407(b) could act as a judge in the Southern District of Texas and rule on the subpoena issued to OMR if that subpoena related to a deposition. But the subpoena does not pertain in any manner to a deposition. Therefore, the only judges who may resolve the issues raised are those within the Southern District of Texas. Rule of Civil Procedure 45 provides, "On timely motion, *the court by which a subpoena was issued* shall quash or modify the subpoena"[16] and, "Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt *of the court from which the subpoena issued.*"[17]

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[14] *Id.* at 882.

[15] *See* Fed.R.Civ.P. 45.

[16] Fed.R.Civ.P. 45(c)(3)(A) (emphasis added).

[17] Fed. R. Civ. P. 45(e) (emphasis added).

Because I cannot ignore the language chosen in § 1407 or engraft additional language, I must respectfully dissent.

Federal Rules of Civil Procedure

Rule 45. Subpoena

* * *

(c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection, copying, testing, or sampling of designated electronically stored information, books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection, copying, testing, or sampling may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to producing any or all of the designated materials or inspection of the premises – or to producing electronically stored information in the form or forms requested. If objection is made, the party serving the subpoena shall not be entitled to inspect, copy, test, or sample the materials or inspect the premises except

pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production, inspection, copying, testing, or sampling. Such an order to compel shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection, copying, testing, or sampling commanded.

(3)(A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held;

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

* * *

(e) Contempt. Failure of any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued. An adequate cause for failure to obey exists when a subpoena purports to require a nonparty to attend or produce at a place not within the limits provided by clause (ii) of subparagraph (c)(3)(A).

28 U.S.C. § 1407. Multidistrict litigation

(a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: *Provided, however*, That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

(b) Such coordinated or consolidated pretrial proceedings shall be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation. For this purpose, upon request of the panel, a circuit judge or a district judge may be designated and assigned temporarily for service in the transferee district by the Chief Justice of the United States or the chief judge of the circuit, as may be required, in accordance with the provisions of chapter 13 of this title. With the consent of the transferee district court, such actions may be assigned by the panel to a judge or judges of such district. The judge or judges to whom such actions are assigned, the members of the judicial panel on multidistrict litigation, and other circuit and district judges designated when needed by the panel may exercise the powers of a district judge in any

district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings.

* * *

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FILED
JUL 27 2007
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No. 06-1437

IN THE

Supreme Court of the United States

CLIENTS AND FORMER CLIENTS OF BARON & BUDD, P.C. and OCCUPATIONAL MEDICAL RESOURCES, INC.,
Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

The proceedings below were two "miscellaneous" matters opened in the United States District Court for the Southern District of Texas for document subpoenas issued at the instance of parties to litigation in the Asbestos Multi-District Litigation Court No. 875 ("MDL 875"), pending in the United States District Court for the Eastern District of Pennsylvania. The parties to those miscellaneous matters were: (1) the Texas entity to which the subpoenas[1] were directed, Occupational Medical Resources, Inc. ("OMR"), and (2) the parties who sought the subpoena. Respondents listed below, who are defendants in MDL 875 and are Respondents before this Court.

The 160 "individual" Petitioners listed as "clients and former clients of Baron & Budd, P.C." were not named in or served with any subpoena, and were, in fact, denied intervention by the Texas District Court in the miscellaneous proceedings. That order denying intervention by these individuals was not appealed, reversed, vacated, or disturbed, by the Court of Appeals' ruling on the petition for writ of mandamus. In fact, Petitioners did not raise it whatsoever in their petition to the Court of Appeals. Further, the District Court's denial of intervention is not raised as an issue in the Petition to this Court. Accordingly, as discussed in Section I below, the individual "clients and former clients of Baron & Budd, P.C." are not proper party-Petitioners with standing before this Court.

Respondents are A.R. Wilfley & Sons, Inc.; Accurate Felt & Gasket Co., Inc.; Allied Glove Corporation (sometimes sued as Nationwide Glove Corporation); Amsted Industries,

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[1] Technically identical subpoenas were served on OMR and for a related entity to ensure that all corporate entities associated with OMR were served. For the purposes of this brief, reference will be made to only a "subpoena" in the singular, issued to OMR itself.

Inc.; Baldor Electric Company; Bondex International, Inc.; CertainTeed Corporation; Chemtura Corporation; Cooper Alloy Corp.; Crossfield Products Corp.; Eastern Safety Equipment Company, Inc. (sometimes sued as Aearo Company); Flexo Products, Inc.; Gardner Denver, Inc.; General Electric Co.; Georgia-Pacific Corporation; The Gorman-Rupp Company; Gulf Coast Marine Supply Company; Pulsafeeder, Inc.; Viking Pump Company; Warren Rupp, Inc.; Illinois Tool Works Inc.; Ingersoll-Rand Company; Lawrence Pumps, Inc.; Magnetrol International Incorporated; Marine Specialty Company, Inc.; Mueller Steam Specialty; National Service Industries, Inc. f/d/b/a North Bros. Company; Owens-Illinois, Inc. d/b/a O-I; Pecora Corporation; Pneumo Abex, LLC; Rogers Corporation; Aurora Pump Company; BIF; DeZurik, Inc.; Layne & Bowler Pump Group; Marsh Instruments; Standard Equipment Company, Inc.; Turner Supply Company; Union Carbide Corporation; Amchem Products, Inc.; Warren Pumps, LLC; Yeoman's Chicago Corporation (also erroneously served for "Chicago Pump Company" and/or "Morris Machine Works/Morris Pumps"); Yuba Heat Transfer.

CORPORATE DISCLOSURES

The nongovernmental corporate party, A.R. Wilfley & Sons, Inc., does not have any parent corporation or publicly held corporation that owns 10% or more of its stock.

The nongovernmental corporate party, Accurate Felt & Gasket Manufacturing Co., does not have any parent corporation or publicly held corporation that owns 10% or more of its stock.

The nongovernmental corporate party, Allied Glove Corporation, does not have any parent corporation or publicly held corporation that owns 10% or more of its stock.

The nongovernmental corporate party, Amsted Industries, Inc., does not have any parent corporation or publicly held corporation that owns 10% or more of its stock.

The nongovernmental corporate party, Baldor Electric Company, does not have any parent corporation or publicly held corporation that owns 10% or more of its stock.

The nongovernmental corporate party, Bondex International, Inc., has the following parent corporation(s) or publicly held corporation(s) that owns 10% or more of its stock: RPM, Inc.

The nongovernmental corporate party, CertainTeed Corporation, has the following parent corporation(s) or publicly held corporation(s) that owns 10% or more of its stock: Saint Gobian.

The nongovernmental corporate party, Chemtura Corporation f/k/a Crompton Corporation, does not have any parent corporation or publicly held corporation that owns 10% or more of its stock.

The nongovernmental corporate party, Cooper Alloy Corporation, in the above listed civil action does not have any

parent corporation or publicly held corporation that owns 10% or more of its stock.

The nongovernmental corporate party, Crossfield Products Corp., does not have any parent corporation or publicly held corporation that owns 10% or more of its stock.

The nongovernmental corporate party, Eastern Safety Equipment Company, Inc., does not have any parent corporation or publicly held corporation that owns 10% or more of its stock.

The nongovernmental corporate party, Flexo Products, Inc., does not have any parent corporation or publicly held corporation that owns 10% or more of its stock.

The nongovernmental corporate party, Gardner Denver, Inc., does not have any parent corporation or publicly held corporation that owns 10% or more of its stock.

The nongovernmental corporate party, General Electric Company, does not have any parent corporation or publicly held corporation that owns 10% or more of its stock.

The nongovernmental corporate party, Georgia-Pacific LLC, f/k/a Georgia-Pacific Corporation, does not have any parent corporation or publicly held corporation that owns 10% or more of its stock.

The nongovernmental corporate party, The Gorman-Rupp Company, does not have any parent corporation or publicly held corporation that owns 10% or more of its stock.

The nongovernmental corporate party, Gulf Coast Marine Supply Company, does not have any parent corporation or publicly held corporation that owns 10% or more of its stock.

The nongovernmental corporate party, Viking Pump, Inc., has the following parent corporation(s) or publicly held corporation(s) that owns 10% or more of its stock: IDEX Corporation.

The nongovernmental corporate party, Warren Rupp, Inc., has the following parent corporation(s) or publicly held corporation(s) that owns 10% or more of its stock: IDEX Corporation.

The nongovernmental corporate party, Illinois Tool Works Inc., successor by merger to Ransburg Corporation, successor by merger to the DeVilbiss Industrial Products Corporation, successor to the Industrial/Commercial Division of The DeVilbiss Company (on behalf of Illinois Tool Works, Inc.), does not have any parent corporation or publicly held corporation that owns 10% or more of its stock.

The nongovernmental corporate party, Ingersoll-Rand Company, does not have any parent corporation or publicly held corporation that owns 10% or more of its stock.

The nongovernmental corporate party, Lawrence Pumps, Inc., does not have any parent corporation or publicly held corporation that owns 10% or more of its stock.

The nongovernmental corporate party, Magnetrol International Incorporated, does not have any parent corporation or publicly held corporation that owns 10% or more of its stock.

The nongovernmental corporate party, Marine Specialty Company, Inc., does not have any parent corporation or publicly held corporation that owns 10% or more of its stock.

The nongovernmental corporate party, Mueller Steam Specialty, does not have any parent corporation or publicly held corporation that owns 10% or more of its stock.

The nongovernmental corporate party, National Service Industries, Inc., does not have any parent corporation or publicly held corporation that owns 10% or more of its stock.

The nongovernmental corporate party, Owens-Illinois, Inc. d/b/a O-I, does not have any parent corporation or publicly held corporation that owns 10% or more of its stock.

The nongovernmental corporate party, Pecora Corporation, does not have any parent corporation or publicly held corporation that owns 10% or more of its stock.

The nongovernmental corporate party, Pneumo Abex, LLC, has the following parent corporation(s) or publicly held corporation(s) that owns 10% or more of its stock: M & F Worldwide Corporation.

The nongovernmental corporate party, Rogers Corporation, does not have any parent corporation or publicly held corporation that owns 10% or more of its stock.

The nongovernmental corporate party, Aurora Pump Company, has the following parent corporation(s) or publicly held corporation(s) that owns 10% or more of its stock: Pentair, Inc.

The nongovernmental corporate party, BIF, has the following parent corporation(s) or publicly held corporation(s) that owns 10% or more of its stock: SPX Corporation.

The nongovernmental corporate party, DeZurik, Inc., has the following parent corporation(s) or publicly held corporation(s) that owns 10% or more of its stock: SPX Corporation.

The nongovernmental corporate party, Layne & Bowler Pump Group, has the following parent corporation(s) or publicly held corporation(s) that owns 10% or more of its stock: SPX Corporation.

The nongovernmental corporate party, Marsh Instruments, has the following parent corporation(s) or publicly held corporation(s) that owns 10% or more of its stock: Marsh Bellofram Corporation.

The nongovernmental corporate party, Standard Equipment Company, Inc., does not have any parent corporation or publicly held corporation that owns 10% or more of its stock.

The nongovernmental corporate party, Turner Supply Company, does not have any parent corporation or publicly held corporation that owns 10% or more of its stock.

The nongovernmental corporate party, Union Carbide Corporation, has the following parent corporation(s) or publicly held corporation(s) that owns 10% or more of its stock: The Dow Chemical Company.

The nongovernmental corporate party, Amchem Products, Inc., has the following parent corporation(s) or publicly held corporation(s) that owns 10% or more of its stock: The Dow Chemical Company.

The nongovernmental corporate party, Warren Pumps, LLC, does not have any parent corporation or publicly held corporation that owns 10% or more of its stock.

The nongovernmental corporate party, Yeoman's Chicago Corporation (also erroneously served for "Chicago Pump Company" and/or "Morris Machine Works/Morris Pumps"), does not have any parent corporation or publicly held corporation that owns 10% or more of its stock.

The nongovernmental corporate party, Yuba Heat Transfer, does not have any parent corporation or publicly held corporation that owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
PARTIES TO THE PROCEEDING	i
CORPORATE DISCLOSURES	iii
TABLE OF AUTHORITIES	x
INTRODUCTION	1
STATEMENT OF THE CASE	1
REASONS WHY THE PETITION SHOULD BE DENIED	4
I. THE INDIVIDUALS DESCRIBED AS "CLIENTS AND FORMER CLIENTS OF BARON AND BUDD, P.C." ARE NOT PROPER PARTIES TO THIS PETITION	5
II. THERE IS NO CONFLICT IN THE CIRCUITS	6
III. THE COURT OF APPEALS CORRECTLY HELD THAT THE MDL COURT MAY DECIDE DISPUTES RELATED TO DOCUMENT SUBPOENAS AS WELL AS SUBPOENAS FOR DEPOSITIONS	7
IV. THE "PLAIN MEANING" RULE OF STATUTORY CONSTRUCTION IS NOT IMPLICATED	10
V. THE EXTRAORDINARY REMEDY OF MANDAMUS WAS NOT WARRANTED IN THE COURT OF APPEALS	13
CONCLUSION	14

TABLE OF AUTHORITIES

CASES — Page

Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33 (1980) 13, 14

Davis v. Mich. Dept. of Treasury, 489 U.S. 803 (1989) 11

HCA, Inc. v. United States ex rel. Pogue, 2002 WL 31953748 (M.D. Tenn. 2002) 7

In re Silica Prods. Liab. Litig., 398 F. Supp. 2d 563 (S.D. Tex. 2005) 2

In re Asbestos Prods. Liab. Litig. (No. VI), MDL No. 875, 771 F. Supp. 415 (J.M.P.L. 1991) 2, 8

In re Auto Refinishing Paint Antitrust Litig., 229 F.R.D. 482 (E.D. Pa. 2005) 7, 10

In re New York City Mun. Sec. Litig., 572 F.2d 49 (2nd Cir. 1978) 8

In re Sealed Case, 141 F. 3d 337 (D.C. Cir. 1998) 6, 7

In re Subpoenas Served on Wilmer, Culter & Pickering & Goodwin Proctor LLP, 255 F. Supp. 2d 1 (D.D.C. 2003) 7, 9

In re Subpoena Issued to Boies, Schiller & Flexner LLP, 2003 WL 1831426 (S.D.N.Y. 2003) 7, 10

Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Phillips Corp., 510 U.S. 27 (1993) 5, 6

Lexecon, Inc. v. Milberg, Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1997) 10, 11

Roche v. Evaporated Milk Ass'n., 319 U.S. 21 (1943) 13

United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., Inc., 238 F. Supp. 2d 270 (D.D.C. 2002) 7, 8, 9, 12, 13

U.S. Nat'l Bank of Or. v. Independent Ins. Agents of Am., Inc., 508 U.S. 439 (1993) 11

TABLE OF AUTHORITIES—Continued

	Page
Will v. Calvert Fire Ins. Co., 437 U.S. 655 (1978)	13

STATUTES AND RULES

28 U.S.C. § 1407	*passim*
Supreme Court Rule 14.1	5, 6
Fed. R. Civ. P. 45	12, 13

MISCELLANEOUS

9 James W. Moore et al., Moore's Federal Practice § 45.40[4] (Matthew Bender 3d ed. 2006)	7
9A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 2459, 2006 Supp. (West 1995)	7
Admin. Order Authorizing Discovery Concerning Litigation Screenings, *In re Asbestos Prods. Liab. Litig. (No. VI)*, MDL 875 (E.D. Pa. Mar. 23, 1999)	2
Admin. Order No. 8, *In re Asbestos Prods. Liab. Litig. (No. VI)*, MDL 875 (E.D. Pa. Jan. 15, 2002)	2
H.R. Rep. 90-113, 90th Cong., 2nd Sess., 1968 U.S. Code Cong. & Adm. News 1898 (Feb. 28, 1968)	8, 9
The Silicosis Story: Mass Tort Screening and the Public Health: Hearing Before the Subcomm. on Oversight and Investigations, 109th Cong. (Mar. 8, 2006)	2

IN THE

Supreme Court of the United States

No. 06-1437

CLIENTS AND FORMER CLIENTS OF BARON & BUDD, P.C. and OCCUPATIONAL MEDICAL RESOURCES, INC.,
Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

INTRODUCTION

Respondents respectfully request that this Court deny the petition for writ of certiorari, seeking review of the decision of the United States Court of Appeals for the Fifth Circuit denying mandamus relief. That opinion is reported at 478 F.3d 670 (5th Cir. 2007).

STATEMENT OF THE CASE

On August 1, 2006, the Respondents, party defendants in MDL 875 pending in the United States District Court for the Eastern District of Pennsylvania, had document subpoenas issued to Petitioner OMR, a Texas company, through the

United States District Court for the Southern District of Texas. OMR operated as a "screening" enterprise for the purpose of identifying potential asbestos personal injury plaintiffs. The document subpoena sought the production of documents, for inspection and copying at its offices, related to those practices. The fraudulent, assembly-line practices of screening companies and unscrupulous physicians who have generated false "diagnoses" for mass tort claimants have been the subject of both judicial decisions and congressional inquiry. *See, e.g., In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 634-35 (S.D. Tex. 2005); *The Silicosis Story: Mass Tort Screening and the Public Health: Hearing Before the Subcomm. on Oversight and Investigations*, 109th Cong. (Mar. 8, 2006). The MDL 875 Court has specifically acknowledged that the practice of filing mass screened asbestos cases is "tantamount to a race to the courthouse," Admin. Order No. 8, at 1, *In re Asbestos Prods. Liab. Litig. (No. VI)*, MDL 875 (E.D. Pa. Jan. 15, 2002), and that court has specifically authorized discovery regarding litigation screenings, Admin. Order Authorizing Discovery Concerning Litigation Screenings, at 1, *In re Asbestos Prods. Liab. Litig. (No. VI)*, MDL 875 (E.D. Pa. Mar. 23, 1999).

The Rule 45 subpoena served on OMR only sought the production of specified documents and left the box on the subpoena form commanding a person to appear for deposition unchecked, as it was deemed by Respondents that no deposition of a company official would be necessary, at least at the time of production. The subpoena had a miscellaneous cause number assigned by the Southern District of Texas but indicated it related to case proceedings in MDL 875. In response to the subpoena, OMR filed objections on August 10, 2006 and a motion to quash in the Southern District of Texas on August 24, 2006. OMR's motion objected to the production of any documents whatsoever on the grounds, *inter alia*, that the request was unduly burdensome, overbroad, and sought production of "confidential commercial information." No ob-

jection, however, was lodged by OMR on the ground that the subpoena was for documents only and was not for a deposition. Similarly, on August 25, 2006, the individuals asserted to be "clients and former clients of Baron & Budd, P.C.," who were not named in or served with any subpoena, moved to intervene and to quash the subpoena, alleging privacy interests and that they were not plaintiffs in MDL 875, although some were admittedly asbestos plaintiffs in other cases. As with OMR, no objection was lodged on any claim that the subpoena to OMR was only for the production of documents.

On September 20, 2006, the Southern District of Texas issued an order denying the individuals' motion to intervene and, with respect to OMR, ruled that further pleadings on the subpoena dispute should be filed in MDL 875. App. at 5-6. The District Court did not address the merits of OMR's objections to the subpoena but, in effect, chose to defer ruling to the district judge for MDL 875, who has responsibility for coordinated and consolidated pretrial proceedings in asbestos cases.[1]

OMR, and also the would-be intervenors, then filed a petition for mandamus in the United States Court of Appeals for the Fifth Circuit, seeking extraordinary relief on the ground that the Texas District Court had wrongfully withheld jurisdiction to determine whether the subpoena should be enforced or quashed.

On February 7, 2007, a unanimous panel of the Fifth Circuit denied the petition for mandamus. App. 1-4. 478 F.3d 670 (5th Cir. 2007). The Court of Appeals, following the "overwhelming weight of authority" and "convincing analysis of myriad district courts," as well as the "persuasive analysis" of treatise commentators, held that in multi-district litigation

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[1] MDL 875 has already ruled on similar objections made by other entities who were served with identical subpoenas and overruled these objections.

matters, the court in charge of consolidated proceedings has the power to rule on a motion to quash subpoenas, issued by other district courts but related to MDL cases, and that subpoenas for the production of documents were included in that power.[2]

Petitions for panel rehearing and rehearing en banc were denied, with one dissent from the denial of panel rehearing. App. at 7.

It is noted that as no documents have been produced by OMR, Respondents filed a motion to compel production in October 2006 before the MDL Judge and the relative merits of the subpoena dispute remain pending before MDL 875 District Judge James Giles. In January 2007, Baron & Budd, P.C. filed a motion to intervene in the pending MDL proceedings with regard to the document subpoenas and to oppose their enforcement. That motion also remains pending.

REASONS WHY THE PETITION SHOULD BE DENIED

The Petition demonstrates none of the factors which would warrant the exercise of certiorari jurisdiction. As a threshold matter, the individuals described as "clients and former clients" of a law firm are not proper party-petitioners under the circumstances. Substantively, there is no conflict in the Circuit Courts of Appeal nor was there any departure from a decision of this Court in the Fifth Circuit's denial of mandamus relief. As the Court of Appeals observed, there is in fact a consensus among the district courts and treatise commentators that for subpoenas related to multi-district litigation, the

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[2] In denying mandamus relief on the merits of OMR's petition, the Court of Appeals declined to reverse or vacate the district court's order denying intervention to the individuals asserted to be "clients and former clients" of the law firm. Petitioners did not raise the denial of their motion to intervene whatsoever in their petition for writ of mandamus.

judge assigned to conduct consolidated and pretrial proceedings may logically and reasonably determine disputes related to document productions as well as depositions. The Fifth Circuit cannot be said to have erred in denying the extraordinary and discretionary remedy of mandamus under the circumstances and as a practical matter, the substantive validity of OMR's objections to the document subpoena are pending decision by the MDL judge.

I. THE INDIVIDUALS DESCRIBED AS "CLIENTS AND FORMER CLIENTS OF BARON AND BUDD, P.C." ARE NOT PROPER PARTIES TO THIS PETITION.

As a threshold matter, the 160 individuals described as "Clients and Former Clients of Baron and Budd, P.C." are not proper parties with standing to file the Petition under the particular circumstances here. The District Court in fact denied intervention to these individuals, and the Court of Appeals did not reverse, vacate or otherwise disturb that order, see above at the Statement of the Case. With the adverse ruling in the district court on their status as intervenors, the individuals are not the proper parties to seek review in this Court because the lower court's denial of their motion to intervene is not presented as an issue in the petition. *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Phillips Corp.*, 510 U.S. 27 (1993). The instant petition does not include any issue seeking review of their status.

As explained by the Court in *Izumi*, the question of a would-be intervener's status is "akin to a question regarding a party's standing, which we have described as a threshold inquiry that in no way depends on the merits of the case." 510 U.S. at 427 (internal quotations and citations omitted). Although one who has been denied the right to intervene in lower courts may petition the Court for certiorari review, the question must be preserved by meeting Supreme Court Rule

14.1 (a), which provides that "[o]nly the questions set forth in the petition, or fairly included therein, will be considered by the Court." Under *Izumi*, a denial of intervention is a separate question that must be separately stated and is not "fairly included" in a petition devoted to questions on the merits. Here, the issues set forth in the Petition are whether the provisions of the multi-district litigation statute include document subpoenas and whether a motion to quash can be transferred by an issuing district court to another district court handling MDL proceedings. The existing denial of intervenor status for the individual "clients and former clients" of the law firm is neither mentioned nor fairly included in the issues set forth in the Petition.

Accordingly, only OMR, the "screening" business to which the subpoena was directed, may arguably be considered as a party-petitioner.

II. THERE IS NO CONFLICT IN THE CIRCUITS.

There is no conflict in the Circuit Courts of Appeal that would warrant this Court's exercise of certiorari jurisdiction, and the Petition cites none. In fact, the Fifth Circuit is the first and only court of appeals to address and rule upon the particularized issue of whether a district judge assigned to MDL proceedings may consider and rule upon a motion to quash a subpoena for documents sought in relation to the multi-district proceedings but issued by another district court. There is no conflict in this particular context, material or otherwise.

The Petition suggests at pp. 4-5 that the Fifth Circuit decision conflicts with *In Re Sealed Case*, 141 F.3d 337 (D.C. Cir. 1998). It does not. *Sealed Case* holds that for Rule 45 purposes, only an issuing district court for a subpoena may consider a motion to quash the subpoena, not the district court in which the underlying case is pending. *Sealed Case*, however, did not involve or consider a subpoena related to multi-

district proceedings assigned to a MDL judge under 28 U.S.C. § 1407 (b), and it is therefore distinguishable and not indicative of any real conflict with the Fifth Circuit.[3] Moreover, there is no real dispute among the district courts. In fact, as discussed in the section below, district courts and commentators that have addressed this issue are in agreement that a motion to quash a document subpoena related to multi district proceedings can be properly heard by a MDL court. *E.g.*, *In re Auto Refinishing Paint Antitrust Litig.*, 229 F.R.D. 482, 485 n.5 (E.D. Pa. 2005); *United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., Inc.*, 238 F. Supp. 2d 270, 274-75 (D.D.C. 2002); *In re Subpoenas Served on Wilmer, Culter & Pickering & Goodwin Proctor LLP*, 255 F. Supp. 2d 1, 1-3 (D.D.C. 2003); *HCA, Inc. v. United States ex rel. Pogue*, 2002 WL 31953748, at *3-*4 (M.D. Tenn. 2002); *In re Subpoena Issued to Boies, Shiller & Flexner LLP*, 2003 WL 1831426, at *1 (S.D.N.Y. 2003); 9 James W. Moore et al., Moore's Federal Practice § 45.40[4], at 45-75 to 45-77 (Matthew Bender 3d ed. 2006) (footnotes omitted); 9A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 2459, 2006 Supp., at 19 (West 1995).

III. THE COURT OF APPEALS CORRECTLY HELD THAT THE MDL COURT MAY DECIDE DISPUTES RELATED TO DOCUMENT SUBPOENAS AS WELL AS SUBPOENAS FOR DEPOSITIONS.

There is no basis for the Court to grant the Petition, because the Court of Appeals correctly held, along with numerous district courts and leading treatise commentators, that a MDL judge under 28 U.S.C. § 1407(b) may determine

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[3] In fact, rather than conflicting with *Sealed Case*, the Fifth Circuit opinion accepted the basic premise that in normal litigation, "[a] motion to quash or modify a subpoena is to be granted by the court in which a subpoena was issued." App. at 3.

disputes related to document subpoenas issued in other district courts, as well as disputes relating to subpoenas for depositions issued in other district courts as part of its mandate to handle coordinated and consolidated pretrial proceedings. As one district court has put it, it would make "no sense" for § 1407 (b) to confer authority to conduct depositions but not the authority to require the production of documents. *United States ex rel Pogue v. Diabetes Treatment Ctrs. of Am. Inc.*, 238 F. Supp. 2d 270, 275 (D.D.C. 2002) (internal citation and quotation omitted).

The salutory purposes of the multi-district litigation statute, as well as the order creating asbestos MDL 875, include, *inter alia*, the centralized management and coordination of consolidated pretrial proceedings in transferred cases so as to permit the efficient, just and effective conduct of such actions. *See, e.g., In Re New York City Mun. Sec. Litig.*, 572 F.2d 49, 51 (2nd Cir. 1978).; *Pogue*, 238 F. Supp. 2d at 273; *In re Asbestos Prods. Liab. Litig. (No. VI), MDL No. 875*, 771 F. Supp. 415, 417 (holding that "centralization under § 1407 in the Eastern District of Pennsylvania will best serve the convenience of the parties and witnesses and promote the just and efficient conduct of this litigation"). It is beyond question that the supervision and conduct of pretrial discovery, including the production of documents, depositions, and the motions pertaining thereto, are at the heart of the centralized nature of a MDL court and are the most basic judicial functions of the district judges assigned to those matters. MDL courts were created to avoid

> conflicting pretrial discovery demands for documents and witnesses [that] would disrupt the Federal courts. . . . The objective of the legislation is . . . to assure the 'just and efficient conduct' of such actions. The committee believes that the possibility for conflict and duplication in discovery and other pretrial procedures in related cases can be

> avoided or minimized by such centralized management. . . . By the term 'pretrial proceedings' the committee has reference to the practice and procedure which precede the trial of an action. These generally involve deposition and discovery . . . . [and] the [MDL] transferee district court would have authority to render summary judgement, to control and limit proceedings, and to impose sanctions for failure to make discovery or comply with pretrial orders.

H.R. Rep. 90-113, 90th Cong., 2nd Sess., 1968 U.S. Code Cong. & Adm. News 1898, *1-2 (Feb. 28, 1968).

Section 1407(b) states that MDL judges "may exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions" in consolidated MDL cases. App. 21-22. Although the Fifth Circuit and district courts have acknowledged a potential tension between provisions of Rule 45 and the statutory permission granted a MDL judge to act "in any district" to "conduct depositions," the overwhelming consensus is that § 1407(a), reasonably construed, permits the MDL judge to act to resolve subpoena disputes in the issuing district, including disputes involving document subpoenas. The strained approach and prohibition advocated by Petitioners has been correctly rejected. *Pogue*, 238 F. Supp. 2d 270, 275 (holding that to effectuate the goals of § 1707 (b), "the power to act as the judge of any district for pretrial depositions includes as an incident power to enforce a subpoena duces tecum") (collecting cases); *In re Subpoenas Served on Wilmer, Cutler, Pickering and Goodwin Proctor LLP*, 255 F. Supp. 2d 1, 2 (D.D.C. 2003) (district court issuing document subpoena defers ruling on motion to quash to MDL judge because, *inter alia*, the subpoena "relates directly to a set of proceedings that have been consolidated for pretrial purposes." under § 1407 the MDL judge may exercise the powers of a district judge in *any* district, and

deferring to the MDL judge who was "already familiar with the massive litigation . . . serves the interests of justice, efficiency, and consistency that underlie the MDL rules"); *In re Subpoena Issued to Boies, Schiller & Flexner LLP*, 2003 WL 1831426 (S.D.N.Y. 2003) (deferring to MDL judge on motion to quash document subpoenas because enforcing or quashing a subpoena duces tecum is inherent to the authority to supervise pretrial proceedings and "pretrial depositions" in "any district."); *In re Auto Refinishing Paint Antitrust Litig.*, 229 F.R.D. 482, 485 n.5 (E.D. Pa. 2005).

Accordingly, the lower federal courts have reached a reasonable and correct consensus in practice and approach to the resolution of this issue, and there is no pressing need for the intervention of this Court.

IV. THE "PLAIN MEANING" RULE OF STATUTORY CONSTRUCTION IS NOT IMPLICATED

The Petitionor contends at Pages 4-9 that the Court of Appeals departed from the "plain meaning" rule of statutory construction because the language of 28 U.S.C. § 1407(b) states that the MDL judge may exercise the powers of a district judge in any district for the purpose of "conducting pretrial depositions" in MDL proceedings. The Petition seeks to rely upon *Lexecon, Inc. v. Milberg, Weiss Bershad Hynes & Lerach*, 523 U.S 26 (1997). However, *Lexecon* is distinguishable and is not germane to the decision below, and the "plain meaning" rule, which Respondents concede is a principal method of statutory construction, cannot be stretched beyond its reasonable and intended uses. As noted above, the Petitioner's strained attempt to confine MDL judges to "conducting depositions" in other districts—and not permitting resolution of document disputes—has been fairly rejected by the lower courts.

First, the *Lexecon* decision is distinguishable in that it did not construe any provision of 28 U.S.C. § 1407(b), and it

applied the "plain meaning" rule to give literal effect to an explicit and unconditional statutory command that was in fact plain and straightforward. Section 1407(b) unambiguously required that:

> Each action so transferred [to a multi-district litigation court] *shall be remanded* [by the Judicial Panel on Multi-District Litigation] *at or before the conclusion* of such pretrial proceedings to the district from which it was transferred.

Id. (emphasis added). As found by *Lexecon*, the plain meaning of this straightforward command, which used the mandatory "shall," was that the "self transfer" of cases for trial, rather than a remand to the originating district for trial, was prohibited. 523 U.S. at 35-36. *Lexecon* did not address the very different language and purposes of § 1407(b), and accordingly the Fifth Circuit did not depart from that case in any way.

Second, the "plain meaning rule" almost by definition does not apply where statutory language is not obligatory and clear, nor does it compel a court in those circumstances to ignore the context of particular language, to discard the fundamental purposes of an act, or to reach an interpretation of language which is at odds with common sense. *Davis v. Mich. Dept. of Treasury*, 489 U.S. 803, 809 (1989) (re-jecting "hypertechnical" reading of statutory language as implausible and observing that it is fundamental that the words of a statute "cannot be construed in a vaccum" but, instead, "must be read in context and with a view to their place in the overall statutory scheme"); *U.S. Nat'l Bank of Or. v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 454-455 (1993) (noting that a statute's plain meaning must be enforced but that a court "must not be guided by a single sentence or member of a sentence but look to the provision of the whole law, and to its object and policy") (internal quotation omitted). The Petition's claim that disputes over document subpoenas

related to MDL pretrial proceedings are never within the purview of a MDL Judge makes just these mistakes.

The lower courts which have rejected such arguments have understood that a strained and narrow reading of the type of subpoena disputes that may be considered by a MDL Judge would be at odds with the overriding purposes of multi-district litigation and would be illogical. The isolated words, taken at the most literal extreme argued for in the petition would limit the MDL judge only to "conducting pretrial depositions" in other districts—an unusual concept and terminology—and not even to determine disputes arising over depositions. The provision at issue is not in the nature of an express mandatory limitation on the MDL judge; it does not use the unambiguous "shall." And, from a practical standpoint, it would make no sense for a MDL judge to be able to determine disputes regarding deposition subpoenas and not also be able to require the production of subpoenaed documents related to those depositions or any other MDL proceeding. *See, e.g.*, *Pogue*, 238 F. Supp. at 275. The *Pogue* court further explains the counterproductive nature of requireing that a MDL party only seeking the production of documents, as permitted by Federal Rule of Civil Procedure 45(c)(2)(A), to also have to demand a deposition.

> [A subpoena duces tecum can be issued as an incident to] a deposition. In this case, however, the subpoena duces tecum was not issued pursuant to a deposition notice. . . . Relator understandably did not want to waste his allotted depositions by noticing depositions to accompany these subpoenas duces tecum for the sole purpose of invoking the Court's jurisdiction to enforce under § 1407. The laws and rules governing federal courts strive to minimize elaborate formality and needless procedure. . . . To effectuate those goals and to avoid placing on parties and nonparties from whom

> documents are sought the burden of holding a pro forma deposition in order to come under the aegis of § 1407, see Fed. R. Civ. P. 45(c)(2)(A) (a subpoena to produce documents does not require the person to appear), the Court holds that the power to act as the judge of any district for pretrial depositions includes as an incident the power to enforce subpoenas duces tecum.

238 F. Supp. 2d at 274-75.

The Petitioner's "plain meaning" argument is without merit as a basis for review of the Court of Appeals' judgment.

V. THE EXTRAORDINARY REMEDY OF MANDAMUS WAS NOT WARRANTED IN THE COURT OF APPEALS

Finally, it is respectfully submitted that the context in which this Petition arises, from the denial by the Court of Appeals of the extraordinary remedy of mandamus, also militates against the exercise of the Court's certiorari jurisdiction.

The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations. *Allied Chem. Corp. v. Daiflon, Inc.*, 499 U.S. 33, 34 (1980). In the Court of Appeals, the burden was on Petitioner to "show that its right to issuance of a writ is clear and indisputable." *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 662 (1978) (granting certiorari but overturning a grant of mandamus). Only exceptional circumstances "amounting to a judicial usurpation of power will justify the invocation of this extraordinary remedy." *Will*, 437 U.S. at 95. The use of the writ in aid of appellate jurisdiction "has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche v. Evaporated Milk Ass'n.*, 319 U.S. 21, 26 (1943).

The Southern District of Texas deferred ruling on the motion to quash to the MDL judge. Under the circumstances, there was neither a usurpation of judicial power nor a clear, explicit obligation commanding the Texas Court not to defer to the MDL judge. Accordingly, the Court of Appeals did not err in denying the discretionary and extraordinary remedy of mandamus. Similarly, mandamus relief usually requires a demonstration that the petitioner lacks an available alternative remedy. *Allied Chem. Corp. v. Daiflon, Inc.*, 499 U.S. 33, 33 (1980). Here, OMR is not without any alternative remedy, as the substantive merits of the validity of the OMR objections to the Respondents' document subpoena is pending for decision by the MDL 875 Judge.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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